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IN THE

Supreme Court of the United States

OCTOBER TERM OF 1973

No. 73-934

SERVICE TECHNOLOGY CORPORATION, A SUBSIDIARY OF LTV AEROSPACE CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is not yet officially reported, but appears at 83 LRRM 2701. The Decision and Order of the National Labor Relations Board, hereinafter referred to as the "Board," is reported at 196 NLRB No. 160, 80 LRRM 1252 (1972). The Denial of the Petition for Rehearing and for Rehearing En Banc by the Fifth Circuit Court of Appeals is reprinted herein as Appendix A; the Opinion and Judgment of the Fifth Circuit Court of Appeals is reprinted herein as Appendix B; the Decision and Order of the Board in Case No. 23-CA-4428 is reprinted herein as Appendix C; and the Decision of the Trial Examiner and Decision, Order and Direction of the Board in Case Nos. 23-CA 3946-1 and 23-RC-3577 are reprinted herein as Appendix D.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered November 5, 1973. This petition is being filed within ninety (90) days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED

Whether the Court erred in its implicit holding that the record as a whole, including the evidence opposed to the Board's point of view, supports the Board's finding that the Company violated Sections 8(a) (3) and 8 (a) (1) of the National Labor Relations Act, 29 U.S.C. §§ 158 (a) (3), (1) (1970), hereinafter referred to as the "Act," by discharging employee Barbara A. Salvato for protected activity on behalf of the International Association of Machinists and Aerospace Workers, hereinafter referred to as the "Union."

Whether the Court below erred in its implicit holding, contrary to the holdings of several United States Courts of Civil Appeals, that an individual is eligible to vote in a Board election where she possesses certain indicia of confidential employee status.

Whether the Court below erred in its implicit holding, contrary to the holdings of several United States Courts of Civil Appeals, that an employer should be required to bargain with the Union where the determining ballot in a representation election is cast by a confidential employee.

Whether the court below erred in its implicit holding, contrary to the holdings of several United States Courts of Civil Appeals, that an employer should be denied a hearing on post election challenges when there are substantial and material fact issues.

STATUTORY PROVISIONS INVOLVED

Section 8 (a) (3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(3)(1970), provides:

> "It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage membership in any labor organization: *Provided,* That nothing in this Act, or any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against any employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ."

Section 8(a) (5) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a) (5) (1970) provides:

> "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Section 8 (a) (1) of the National Labor Relations Act, 29 U.S.C. § 158 (a) (1) (1970) provides:

> "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . ."

STATEMENT OF THE CASE

This petition seeks review of the decision by the United States Court of Appeals for the Fifth Circuit enforcing the order of the National Labor Relations Board. The Board found that Service Technology Corporation, a subsidiary of LTV Aerospace Corporation, hereinafter referred to as the "Company," had violated Sections 8 (a) (3), 8 (a) (5) and 8 (a) (1) of the Act by terminating confidential employee Barbara Salvato and by failing to negotiate with certified representatives of its employees for purposes of collective bargaining. The Company's refusal to bargain was based on the fact that Salvato who was a confidential Company secretary was allowed to campaign and vote for the Union, and was allowed to vote in the National Labor Relations Board election held May 31, 1971. The Company terminated Salvato for threatening fellow employees during an election campaign.

It is undisputed that the Company refused to negotiate with the Union pending a final determination by the United States Courts of the issues involved in this case. The questions to be answered are whether an individual who possesses confidential employee status and whose testimony indicates she possesses such status should be allowed to vote

and campaign for the Union during a Board ordered election, and whether she should be allowed to threaten fellow employees during the course of the campaign.

The Company is a Delaware corporation engaged in performing various work at the National Aeronautics and Space Administration's Manned Spacecraft Center in Houston, Texas. The specific job function involved in this case is the Company's Visitor's Service Section which greets all visitors who come to the Manned Spacecraft Center and escorts them on tours of the Manned Spacecraft Center.

By a decision and direction of election on April 13, 1971, Clifford Potter, Regional Director, hereinafter referred to as "Regional Director," of Region 23 of the National Labor Relations Board ordered an election among certain employees in the above described Section.[1] In that decision the Regional Director specifically excluded the Project Manager's secretary from the voting unit because she was a confidential employee. This decision was then overruled in the Administrative Law Judge's decision which was adopted by the Board.

In the unfair labor practice case, it was alleged that the Company had violated Sections 8(a)(3) and 8(a)(1) of the Act in connection with the discharge of Barbara A. Salvato. The resolution of the challenge to the ballot of Salvato required the resolution of two issues: (1) whether Salvato was a confidential secretary to the Project Manager; and (2) whether Salvato's discharge was in violation

[1] An election was conducted on May 13, 1971 at the Company's job site. After the election it was necessary to resolve the challenges in order to determine the results of the election. The resolution of the challenges to three of the ballots was not contested by the Company. Since the resolution of the fourth challenged ballot, i.e., the ballot of former confidential employee Barbara Salvato, involved issues raised in Case No. 23-CA-2946-1, an unfair labor practice case, the representation case and the unfair labor practice case were consolidated.

of Sections 8(a)(3) and 8(a)(1) of the Act. These issues were resolved by the Administrative Law Judge[2] in his decision, order and direction in Cases No. 23-CA-3946-1 and 23-RC-3577. A complaint was issued and answered and the case was transferred to the Board for summary judgment based on the Company's refusal to bargain pending an outcome of the issues involved.

The General Counsel of the Board moved for summary judgment and upon the granting of such motion a decision and order were entered in the case. Subsequent to that time the Board applied for enforcement of its order and the case proceeded through the Courts as earlier noted.

Confidential employee Barbara A. Salvato was employed by the Company at various times beginning May 1967. In May 1968 she served as Secretary to the Project Manager at the Manned Spacecraft Center. She remained secretary for the Project Manager until May 1970 at which time the accounting and payroll system was merged into another contract. The merger of contracts relieved Mrs. Salvato of her responsibilities in bookkeeping, payroll and accounting functions. At that time she was assigned only secretarial duties and testified these duties were "boring" and on her request was transferred to the Exhibit Section.

The evidence indicates that Salvato performed secretarial tasks for the Project Manager and that the assignments included the typing of negotiation notes about the bargaining unit in the Exhibit Section. She was also responsible for typing eligibility lists for the Exhibit Section and typed labor negotiation notes while the Union was in the process of negotiating its new contract. Furthermore, she typed grievances from the bargaining unit and prepared labor memoranda labeled "Private."

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[2] The Title of "Trial Examiner" was changed to Administrative Law Judge effective August 19, 1972.

The evidence indicates that the Project Manager believed Salvato was aware of the fact she was a confidential employee because Salvato had been a confidential secretary performing similar tasks in the past. It also indicates that Salvato failed to include her name on the eligibility list or to protest its omission from such list when she prepared the list prior to the election.

While serving in her confidential capacity, Salvato entered the ladies' lounge in Building No. 1 at the Manned Spacecraft Center on April 19, 1971 and conversed with LeBecca Kite, a new Company employee. The evidence submitted by Kite indicates that she and Salvato previously had gone to lunch with a group of pro-Union people on several occasions during her first few weeks with the Company and that on many occasions the discussion centered around the pending election. Kite further testified that she was asked several times to sign a Union card. In the middle of March 1971, she refused to sign the card because she felt the card was a statement on her part that she was authorizing the Union to bargain for her collectively. Kite testified in great detail that during the conversation in the ladies' lounge on April 19, 1971, she was told that if she would not vote for the Union, she should not vote. She testified that she was threatened during this conversation and felt that the well-being of her job was in jeopardy.

The Project Manager testified that when he became aware of this situation, he terminated Salvato because of her provocative threats made to Kite during the April 19, 1971, conversation.

The election was held May 13, 1971. The final tally of ballots indicated eight ballots for the Union and six ballots for the Company. Four ballots were challenged and these

challenges were sufficient to affect the results of the election. The Regional Director ordered a hearing to be held on the issues raised by the challenged ballots, and this hearing was consolidated with the hearing on the lawfulness of Salvato's discharge. At the end of the hearing only two ballots remained challenged. These were the ballots of Patricia Hopkins and Barbara Salvato. The Hopkins' ballot was challenged by the Union because she was a confidential employee, an employee who acted in confidential capacity to an official who formulates and effectuates labor policy with respect to other employees and Salvato's ballot was challenged by the Board Agent because her name was not on the voter eligibility list. On December 21, 1971, the Administrative Law Judge issued a decision in which he found that neither Hopkins nor Salvato was a confidential employee and directed their ballots be opened and counted. Such decision was inconsistent with the prior determination of voter status previously made by the Regional Director. The Company filed exceptions to this decision, but on May 14, 1972 the Board overruled the exceptions and affirmed the decision and ordered the Regional Director to open and count the remaining ballots. The revised election tally indicated seventeen ballots cast with nine ballots for the Union and eight case for the Company. Accordingly, the Union was certified as the collective bargaining representative for the appropriate unit on June 9, 1972.

On June 13, 1972 the Union requested bargaining but the Company refused to recognize the Union. Subsequently the Union filed a charge with the Board on July 10, 1972 and a complaint was later issued. The Company admitted that it had refused to recognize and bargain with the Union but denied that it violated Sections 8(a)(5) and (1) of the Act.

Thereafter, the General Counsel moved for summary judgment on the grounds that the allegations of the com-

plaint, as admitted in the Company's answer, constituted a prima facie violation of Sections 8(a)(5) and (1) of the Act and that the answer sought only to raise issues already disposed of in the representation hearing. The Board issued an order transferring the case to the Board and requiring the Company to show cause why the General Counsel's motion should not be granted. The Company responded stating that special circumstances existed which required the Board to reconsider the determination made in the representation hearing. The Company further stated that the Board's ruling on the challenged ballot be dismissed as incorrect and that the complaint should be dismissed as a result. The Board granted the General Counsel's motion for summary judgment on the theory that all issues raised by the Company had been litigated in the prior representation proceeding and that the Company had not offered any newly discovered evidence or previously unavailable evidence.

REASONS FOR GRANTING WRIT

I.

THE ENFORCEMENT OF THE BOARD'S ORDER CONFLICTS WITH THE DECISIONS OF THE OTHER CIRCUITS BY ALLOWING A CONFIDENTIAL COMPANY EMPLOYEE TO CAMPAIGN AND VOTE IN A BOARD ELECTION

The Courts have long held that a confidential employee's activities are not protected like those of other nonconfidential employees who are in an appropriate unit. But for the Administrative Law Judge's decision, adopted by the Board, which constitutes an inconsistent administrative finding, the Company could not have violated Sections 8 (a) (5) and (1) of the Act because the Union would not have

had a majority without Salvato's vote. The well established Court policy with regard to confidential secretaries dictates the exclusion of the Salvato ballot based upon her confidential duties. *NLRB* v. *Wheeling Electric Co.*, 444 F.2d 783 (4th Cir. 1971); *NLRB* v. *Retail Clerks International, Ass'n.* 211 F.2d 759 (9th Cir. 1954).

In *Wheeling*, the United States Court of Appeals devoted its attention to the status of the confidential employee under the Act. The petitioner appealed the decision of the Board that Wheeling Electric had violated Sections 8 (a) (3) and (1) of the Act by discharging and refusing to rehire a confidential secretary who refused to perform her duties during a strike. In denying enforcement of the Board's order, the Court held that confidential secretaries were not within the protection of the Act.

> "The Board admits it has always excluded confidential employees from rank-and-file bargaining units .... The treatment of confidential employees by the Board before 1947 could therefore be properly construed by the Congress as it did — that they were not to be afforded the protection of the Act. We think, additionally, that the Board's continued practice after the enactment of the 1947 Amendments can also be properly construed as treating confidential employees in accordance with the intended scope of the Act, i.e., as 'supervisors' ....
>
> "The exclusion of confidential employees from the protection of the Act is consistent with the Act's primary purpose of promoting industrial harmony through collective bargaining .... It is obviously consistent with this purpose to exclude confidential employees from membership in ordinary representative units to prevent unfairness to the employer ....
>
> "It strikes us as nonsense for the Board to exclude Mrs. McConnell from membership in the bargaining unit *and then* extend to her the same protection for the same concerted activity that she would have enjoyed

> if a union member. . . . Management is entitled to security of its confidential information and may insist upon the loyalty of those employees who have access to it. For this reason, confidential employees cannot be granted the protection afforded ordinary employees under the Act. Like supervisors, 'such loyalty cannot be secured if [they] are psychologically allied with, or subject to the pressures of their union on behalf of their rank-and-file' . . . ." *Id* at 786, 788.

Based on the evidence in the case, the reasons stated and the cases cited, Barbara Salvato should have been found to be a confidential employee within the meaning of the cases under the Act and should have been excluded from the Bargaining Unit.

II.

THE ENFORCEMENT OF THE BOARD'S ORDER CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS BY ALLOWING A COMPANY EMPLOYEE TO THREATEN FELLOW COMPANY EMPLOYEES DURING AN ELECTION CAMPAIGN

The suspension and subsequent termination of Salvato was in no way intended to restrain or interfere with the exercise of any of her rights guaranteed by the Act. Counsel for the Acting General Counsel and the Union alleged that the Company seized upon her prohibited actions as an opportunity to discharge Salvato because of her Union activities. Such a presumption is totally without merit. The record wholly supports the Company's contention that Salvato was discharged because of a breach of the Company rule concerning the communication of a threat to a fellow employee.

It is uncontradicted that Salvato and Kite engaged in a conversation in the ladies' lounge on April 19, 1971. Both

parties testified about similar topics. Kite candidly testified that she returned to her desk stunned, angry and related the conversation to a fellow employee. Later, after speaking with the Project Manager, she made some hand-written notes while the incident was still fresh in her mind. The testimony reveals this conversation was not just a casual conversation between "fellow employees" but, rather, an opportunity seized upon by Salvato to make an open, unveiled threat in an attempt to dissuade a fellow employee, who was "not for the Union," from voting in the coming election.

Sections 8(a)(3) and (1) of the Act do not prohibit a Company from exercising its management discharge prerogative unless it is established that the purpose of the employer's action was to discriminatorily discharge an employee because of his or her activities on behalf of a union. In order to sustain such a finding, it is a fundamental prerequisite that there must be some evidence that the Company was illegally motivated in discharging the employee. *NLRB* v. *Agawam Food Mart, Inc.*, 424 F.2d 1045 (1st Cir. 1970); *NLRB* v. *Materials Transportation Company*, 412 F.2d 1074 (5th Cir. 1969); *Miller Electric Manufacturing Co., Inc.* v. *NLRB*, 265 F.2d 225 (7th Cir. 1959); *NLRB* v. *McGahey*, 233 F.2d 406 (5th Cir. 1956). The fact that the Respondent had knowledge of Salvato's Union activities, as a result of the threat made to Kite, is not sufficient proof of an illegal motive behind her discharge. The mere knowledge of union activities has been held to be insufficient proof to support a finding that such union activities formed the basis for termination. *Osceola County Co-op Creamery Association* v. *NLRB*, 251 F.2d 62 (8th Cir. 1958).

It is another fundamental principle of law that neither union membership nor union activity can insulate an em-

ployee from just cause termination based upon the employee's own voluntary acts. *Wellington Mill Division, West Point Mfg. Co.* v. *NLRB*, 330 F.2d 579 (4th Cir. 1964); *NLRB* v. *Birmingham Publishing Company*, 262 F.2d 2 (5th Cir. 1959). The General Counsel may argue that *NLRB* v. *Burnup and Sims, Inc.*, 379 U.S. 21 (1964) and *NLRB* v. *Southern Greyhound Lines*, 426 F.2d 1299 (5th Cir. 1970) are applicable to this set of facts. However, *Burnup and Sims* stands for the proposition that an employer unlawfully interferes with the right of an employee to self-organization when he discharges an employee who is engaged in a protected activity for an *alleged act* of misconduct, *later proven false*, committed during the course of a *protected activity*. *Southern Greyhound* stands for the proposition that an employer may not discharge an employee who refuses to cross a picket line. It does not discuss an employee who takes affirmative action constituting misconduct against the rights of another employee.

An employee *not engaged in protected concerted activities* on behalf of a union *who is guilty of misconduct* which forms the basis of his or her discharge is not subject to such a holding. In the instant case there is no contention that Salvato was engaged in a protected activity at the time she threatened Kite. Rather, the undisputed facts clearly establish that Salvato was not engaged in any protected activity when she committed the act which clearly warranted her discharge. The threat by Salvato was an act of misconduct committed in violation of Company rules and this violation alone formed the basis of her discharge.

It is submitted that the Counsel for the General Counsel failed to support his burden of proof that Salvato was discharged because of her activities on behalf of the Union. The Record clearly supports the contention of the Company

that Salvato was discharged for a breach of Company rules in threatening a fellow employee.

Even if Salvato had been entitled to the protection of the Act, the Board's decision is such a clear departure from established precedent as to demand explanation. The law applicable to the discharge of Salvato is clear, as the Court said in *NLRB* v. *Sutphin Co.-Atlanta, Inc.*, 373 F.2d 890, 893 (5th Cir. 1967):

> "The law applicable to the issue here is clear and may be succinctly stated. The burden is upon the General Counsel to prove and not on the employer to disprove that the purpose of the discharge was to interfere with rights accruing to Adams under §§ 8(a)(3) and (1) of the Act. The Act does not insulate an employee from discharge for engaging in conduct disruptive of harmonious employee relations. Indeed, an employer may discharge for cause or no cause at all. It is only when antiunionism is the motive for the discharge that the Act is violated. . . ."

The Court in *Sutphin* held that a threat by the alleged discriminatee against another employee justified the alleged discriminatee's discharge notwithstanding findings of 8(a)(1) violations by the Company toward this employee.

The Board, in its resolution of the present case, did not question the occurrence of the threat. The Courts have held the Board to the above rule and thwarted Board attempts to explain away such conduct as non-threatening. *NLRB* v. *Suniland Furniture Co.*, 387 F.2d 123 (5th Cir. 1967).

The Court in the *Suniland* case also held that the failure of the company to interrogate the person making the threat does not meet the General Counsel's burden of proof to establish a discriminatory motive. Neither is the Board's reliance on "abruptness" of the discharge persuasive. As

the court said in *NLRB* v. *Fibers International Corp.*, 439 F.2d 1311, 1314 (1st Cir. 1971):

> "The Board's brief says that this 'is a classic "pretext" case.' The fact is, it is more a classic Board rationalization case. We are accustomed to the Board concluding that the employer must have been improperly motivated because it acted too slowly . . . . In the case at bar it has achieved the millenium. Here the company is condemned for its haste. In the next breath it is criticized for its care."

As the Courts have repeatedly held, an employer need not countenance deliberate misconduct by employees, even if they are union leaders. *NLRB* v. *Fibers International Corp., supra*; and *Corriveau & Routhier Cement Block, Inc.* v. *NLRB*, 410 F.2d 347 (1st Cir. 1969). In *Corriveau & Routhier Cement Block, Inc.* v. *NLRB, supra*, the Court said as to even off-the-job threats:

> "On the facts of this case we find such reasoning unpersuasive. An employee's § 7 rights are a shield against employer oppression, not a sword to intimidate fellow employees. Nor do we believe that the loss of the 'right' to threaten another employee will dissuade an employee from saying anything he has any business saying in an organizational context . . . ." *Id.* at 350.

It is also important to point out that the United States Court of Appeals for the Second Circuit has recently determined that certain action by the Board constituted the prescribing of a new policy when it decided that certain employees who were formerly managerial employees constituted an appropriate bargaining unit. *Textron, Inc.* v. *NLRB*, ... F.2d ....., 82 LRRM 2753 (2d Cir. 1973). In *Textron* the Court cited *Wheeling Electric* and ordered the Board to hold a rule-making proceeding on the status of managerial employees under the Taft-Hartley Act. Quoting

the Supreme Court in *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969), the Court stated:

> "The rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application . . . . They may not be avoided by the process of making rules in the course of adjudicatory proceedings." 82 LRBM at 2761.

The Board is obviously straying from its established precedent in this matter when it attempts to make an employee like Salvato something other than a managerial or confidential employee. It fails to consider both court and Board precedent and certainly fails to apply the law of the *Wheeling Electric* and *Textron* decisions.

III.

THE ENFORCEMENT OF THE BOARD'S ORDER CONFLICTS WITH THE DECISIONS OF SEVERAL CIRCUITS BY DENYING THE COMPANY A HEARING WHERE POST ELECTION CHALLENGES CREATE A SUBSTANTIAL AND MATERIAL FACT ISSUE

The various Federal Circuit Courts have consistently ruled that they will not enforce Board orders to bargain where the Board's own decision shows that timely exceptions were disposed of erroneously as a matter of law, or where material exceptions were considered separately and not cumulatively, or where exceptions created substantial and material fact issues which the Board disposed of without granting the employer a hearing. *Trade Winds Co.* v. *NLRB*, 413 F.2d 1213 (5th Cir. 1969); *NLRB* v. *Smith Industries, Inc.*, 403 F.2d 889 (5th Cir. 1968); *Sonoco Products Co.* v. *NLRB*, 399 F.2d 835 (9th Cir. 1968); *NLRB* v. *Ortronix, Inc.*, 380 F.2d 737 (5th Cir. 1967); *Home Town Foods, Inc.* v. *NLRB*, 379 F.2d 241 (5th Cir. 1967); *U.S. Rubber*

Co. v. *NLRB*, 373 F.2d 602 (5th Cir. 1967); *NLRB* v. *Joclin Mfg. Co.*, 314 F.2d 627 (2d Cir. 1963); and *NLRB* v. *West Texas Utilities Co.*, 214 F.2d 732 (5th Cir. 1954). In *Joclin Mfg. Co.*, 314 F.2d at 631-32, the Second Circuit ruled as follows:

> "In consequence a court cannot properly enforce an order finding an employer guilty of an unwarranted refusal to bargain with a union certified in an election if it appears, with respect to challenges affecting the result, *either that they were disposed of erroneously as a matter of law or that the employer raised 'substantial and material factual issues' under the Regulations and was denied a hearing. . . .*" (Emphasis supplied.)

Furthermore, it is also abundantly clear under controlling Court and Board authorities that the Board erroneously rubber-stamped the Administrative Law Judge's Decision that the Company had failed to present evidence in support of its position and that Salvato should be allowed to vote as a regular employee. The General Counsel argued that Respondent relied on precisely the same evidence which the Regional Director and the Administrative Law Judge have already considered and that it should "be bound by the decision of the Board in the representation case." In following this argument the Board clearly misapplied applicable legal principles. *Pepsi-Cola Buffalo Bottling Co.* v. *NLRB*, 409 F.2d 676 (2d Cir. 1969); *NLRB* v. *Trancoa Chemical Corp.*, 303 F.2d 456 (1st Cir. 1962); *Russell-Newman Mfg. Co.*, 158 NLRB 1260 (1966); *American Broadcasting Co.*, 134 NLRB 1458 (1961); and *Leonard Niederriter Co.*, 130 NLRB 113 (1961).

In *Trancoa Chemical*, the First Circuit refused to enforce a Board bargaining order against an employer because the Court determined that the Board was erroneous in not

overturning the union's election victory on the basis of the employer's timely objections. The Court further ruled that the Board's corollary ruling — that the Trial Examiner at the unfair labor practice hearing could reconsider no matters previously decided — was in error. In so ruling, the Court held in part as follows:

> "The act provides that employees shall have representatives 'of their own choosing'. . . . We do not think that the Board's view of what impairs freedom of choice is more sacrosanct than its other fact-finding powers. *Likewise, the Board's corollary ruling that the trial examiner at the unfair labor practice hearing could reconsider no matters previously decided was error.* Respondent is entitled to have all of the misrepresentations viewed together." (Emphasis supplied.) 303 F.2d at 461.

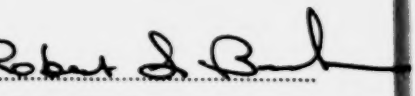
The Board itself has ruled that it is not bound to follow its own previous erroneous legal conclusions and that, therefore, an Administrative Law Judge is not bound to follow prior Board legal determinations in a representation case if such legal conclusions are clearly erroneous. In *American Broadcasting, supra*, the Board ruled that even though it had already made a unit determination in the representation case, it would reconsider its decision in an unfair labor practice proceeding where the disputed matter involved a legal principle. In so ruling, the Board stated:

> "We are reluctant to re-examine at the complaint stage of an 8(a)(5) proceeding those issues resolved in the related representation case. *However, where the disputed matter involves a legal, as distinguished from a mere policy, issue we will reconsider such underlying legal premise if we believe our earlier resolution to be incorrect. . . .*" (Emphasis supplied.) 134 NLRB at 1459.

CONCLUSION

For the reasons set forth above, writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

By 

ROBERT S. BAMBACE
HUGH E. HACKNEY

Attorneys for Service Technology Corporation, a Subsidiary of LTV Technology Corporation

Of Counsel:

FULBRIGHT & CROOKER
800 Bank of the Southwest Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

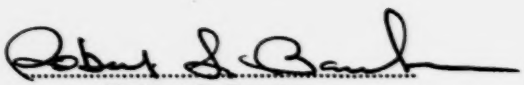
I, Robert S. Bambace, Attorney for Service Technology Corporation, a Subsidiary of LTV Aerospace Corporation, do hereby certify that on this 27th day of December, 1973, copies of the foregoing Petition for a Writ of Certiorari have been served upon the following:

Erwin N. Griswold
Solicitor General
United States Department of Justice
Washington, D. C. 20530

Peter G. Nash
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

Mr. Roe Spencer, Grand Lodge Representative
International Association of Machinists
8383 Stemmons, Suite 346
Dallas, Texas 75247

by mailing the same through the United States mail, postage prepaid.



Robert S. Bambace

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-1103

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SERVICE TECHNOLOGY CORPORATION,
A Subsidiary of LTV Aerospace Corporation,

Respondent.

Application for Enforcement of an Order of The National Labor Relations Board (Texas Case)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion July 6, 1973, 5 Cir., 1973, ... F.2d .....).

(November 5, 1973)

Before BELL, GODBOLD and INGRAHAM,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH, *Clerk*
600 Camp St. — Rm. 102
New Orleans, La. 70130

November 19, 1973

Messrs. Robert S. Bambace
Hugh E. Hackney
Attorneys at Law
800 Bank of the Southwest Bldg.
Houston, Texas 77002

No. 73-1103 — N.L.R.B. vs. Service Technology Corp., Etc.

MANDATE STAYED TO: December 19, 1973

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection

with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and order denying rehearing which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

EDWARD W. WADSWORTH, *Clerk*
By MARYETTE FARLEY
Deputy Clerk

enc.
cc: Mr. Elliott Moore
Mr. Clifford W. Potter

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-1103
Summary Calendar*

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SERVICE TECHNOLOGY CORPORATION,
A Subsidiary of LTV Aerospace Corporation,

Respondent.

Application for Enforcement of an Order of National Labor Relations Board (Texas Case)

(July 6, 1973)

Before BELL, GODBOLD and INGRAHAM,
Circuit Judges.

PER CURIAM: ENFORCED. See Local Rule 21.[1]

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1] See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-1103

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SERVICE TECHNOLOGY CORPORATION,
A Subsidiary of LTV Aerospace Corporation,

Respondent.

JUDGMENT

Before BELL, GODBOLD and INGRAHAM,
Circuit Judges.

THIS CAUSE was submitted to this Court upon application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, Service Technology Corporation, A Subsidiary of LTV Aerospace Corporation, its officers, agents, successors, and assigns on May 11, 1972, as corrected June 27, 1972, and its Order of October 11, 1972. The Court, having determined the case appropriate for summary disposition without oral argument, on July 6, 1973, handed down its opinion granting enforcement of the Board's said Orders.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said Orders of the National Labor Relations Board in said proceeding be enforced, and that

Service Technology Corporation, A Subsidiary of LTV Aerospace Corporation, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said Orders contained.

ENTERED: July 30, 1973

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1103

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SERVICE TECHNOLOGY CORPORATION,
A Subsidiary of LTV Aerospace Corporation,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's proposed judgment in the above captioned matter has this day been served by first class mail upon the following counsel at the address listed below:

Fulbright, Crooker & Jaworski
Att: Robert S. Bambace, Esquire
800 Bank of the Southwest Building
Houston, Texas 77002

/s/ Elliott Moore
Elliott Moore
Acting Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 11 day of July, 1973.

APPENDIX C

199 NLRB No. 102 D-6770

Harris County, Tex.

DECISION AND ORDER
(Number and Title Omitted)

Upon a charged filed on July 10, 1972, by District 37, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Union, and duly served on Service Technology Corporation, a Subsidiary of LTV Aerospace Corporation, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 23, issued a complaint on July 11, 1972, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge[1] were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on June 9, 1972, following a Board election in Case 23-RC-3577, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[2] and

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[1] The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

[2] Official notice is taken of the record in the representation proceeding, Case 23-RC-3577, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151; *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378, enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

that, commencing on or about June 13, 1972, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On July 20, 1972, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On July 31, 1972, counsel for the General Counsel filed directly with the Board a Motion To Transfer and Continue Case Before the Board and Motion for Summary Judgment, requesting that the Board take official notice of the records in the consolidated Cases 23-RC-3577 and 23-CA-3946-1 (196 NLRB No. 160), and that the pleadings herein be considered together therewith, alleging that the Respondent's answer to the complaint raised no issues which were not raised and decided in the prior proceedings, and praying the Board to grant the Motion for Summary Judgment. Subsequently, on August 2, 1972, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed an Opposition to Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

The thrust of the Respondent's answer to the complaint and its Opposition to the Motion for Summary Judgment addresses itself essentially to the Board's finding that Barbara B. Salvato was not a confidential employee under

Board law. Upon our review of the record, including the records in Cases 23-RC-3577 and 23-CA-3946-1, we find no merit in this contention.

Pursuant to a Decision and Direction of Election, an election was conducted on May 13, 1971. The tally of ballots served on the parties at the conclusion of the election reflected that of the valid votes cast, eight ballots were for the Union, six ballots were cast against the Union, and four ballots, determinative of the results of the election, were challenged. No objections were filed to the conduct of the election.

Inasmuch as the challenged ballots raised substantial and material issues, the Regional Director, on June 9, 1971, issued an order directing hearing and consolidating cases, in which he consolidated Cases 23-RC-3577 and 23-CA-3946-1 for the purpose of hearing, ruling, and decision by an Administrative Law Judge. The Regional Director's order also directed that thereafter Case 23-RC-3577 be transferred to and continued before the Board.

During the course of the hearing, the parties agreed that the ballot of Richard Hopkins should not be counted. The Union withdrew its challenge to the ballot of Mary Tucker and agreed that her ballot should be opened and counted. On December 22, 1971, the Administrative Law Judge issued his Decision, in which he found, contrary to the Regional Director, that Barbara B. Salvato was not a confidential employee and recommended that the challenged ballots of Barbara B. Salvato and Patricia Hopkins be opened and counted. Thereafter, the Respondent filed exceptions and a supporting brief which were directed essentially to the Administrative Law Judge's finding that Barbara B. Salvato was not a confidential employee under Board law and to his conclusion that she was unlawfully discharged.

On May 14, 1972, the Board issued its Decision, Order, and Direction in Cases 23-RC-3577 and 23-CA-3946-1,[3] in which it affirmed the rulings, findings, conclusions, and recommendations of the Administrative Law Judge and ordered the Regional Director to open and count the ballots of Barbara B. Salvato, Patricia Hopkins, and Mary Tucker and thereafter prepare and cause to be served on the parties a revised tally of ballots, including therein the count of said ballots, and that the appropriate certification be issued. The revised tally of ballots reflected that of the 17 valid ballots cast, 9 were cast for the Union and 8 were cast against the Union, and, accordingly, on June 9, 1972, the Union was certified as the collective-bargaining representative in the unit herein found appropriate.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We, therefore, find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice

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[3] *Service Technology Corporation, a Subsidiary of LTV Aerospace Corporation*, 196 NLRB No. 160.

[4] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rule and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent is, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of Delaware and has maintained its principal office and place of business at the Manned Spacecraft Center of the National Aeronautics and Space Administration, in Harris County, Texas, herein called NASA site, where it provides facility support services. Respondent's NASA site is the only facility involved in this proceeding. During the preceding 12 months, which are representative of all times material herein, in the course and conduct of said operations, Respondent purchased, transferred, and delivered to its NASA site goods and materials valued in excess of $5000 directly from States of the United States other than the State of Texas.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

District 37, International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All Visitor Services Section, Public Information Section and Exhibit Section employees, performing services for the Employer at the National Aeronautics and Space Administration's Manned Spacecraft Center, Houston, Texas, including full-time and regular part-time escorts, administrative clerks, exhibit specialists, clerk expediters, exhibits schedulers, research writers and communications coordinators, excluding fabricators, refurbishers and warehousemen under the Exhibits Section, the secretary to the project manager, guards, watchmen and supervisors as defined in the Act.

2. The certification

On May 13, 1971, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 23, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on June 9, 1972, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request to Bargain and Respondent's Refusal*

Commencing on or about June 13, 1972, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bar-

gaining representative of all the employees in the above-described unit. Commencing on or about June 13, 1972, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since June 13, 1972, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Service Technology Corporation, a Subsidiary of LTV Aerospace Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District 37, International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All Visitor Services Section, Public Information Section and Exhibit Section employees, performing services for the Employer at the National Aeronautics and Space Administration's Manned Spacecraft Center, Houston, Texas, including full-time and regular part-time escorts, administrative clerks, exhibit specialists, clerk expediters, exhibit schedulers, research writers and communications coordinators, excluding fabricators, refurbishers and warehousemen under the Exhibits Section, the secretary to the

project manager, guards, watchmen and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since June 9, 1972, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about June 13, 1972, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Service Technology Corporation, a Subsidiary of LTV Aerospace Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District 37, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All Visitor Services Section, Public Information Section and Exhibit Section employees, performing services for the Employer at the National Aeronautics and Space Administration's Manned Spacecraft Center, Houston, Texas, including full-time and regular part-time escorts, administrative clerks, exhibit specialists, clerk expediters, exhibits schedulers, research writers and communications coordinators, excluding fabricators, refurbishers and warehousemen under the Exhibits Section, the secretary to the project manager, guards, watchmen and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility at the Manned Spacecraft Center in Harris County, Texas, copies of the attached notice

marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 23 after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. Oct. 11, 1972

John H. Fanning, Member
Ralph E. Kennedy, Member
John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and condi-

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

tions of employment with District 37, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All Visitor Services Section, Public Information Section and Exhibit Section employees, performing services for the Employer at the National Aeronautics and Space Administration's Manned Spacecraft Center, Houston, Texas, including full-time and regular part-time escorts, administrative clerks, exhibit specialists, clerk expediters, exhibits schedulers, research writers and communications coordinators, excluding fabricators, refurbishers and warehousemen under the Exhibits Section, the secretary to the project manager, guards, watchmen and supervisors as defined in the Act.

SERVICE TECHNOLOGY CORPORATION, A SUBSIDIARY OF LTV AEROSPACE CORPORATION
(Employer)

Dated .....

by .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Dallas-Brazos Building, 1125 Brazos Street, Houston, Texas 77002, Telephone 713-226-4296.

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[1]

Before The
National Labor Relations Board
Twenty-Third Region

In the Matter of:

Service Technology Corporation, a subsidiary of
LTV Aerospace Corporation

and

Case No.
23-RC-3577

District 37, International Association of Machinists and
Aerospace Workers, AFL-CIO

APPENDIX D

TXD-703-71
Houston, Tex.

TRIAL EXAMINER'S DECISION
(Number and Title Omitted)

SIDNEY D. GOLDBERG, Trial Examiner: The decision in these cases turns on the meaning of the term "confidential employee" as used in Board decisions excluding such employees from bargaining units.

In Case 23-CA-3946-1 the complaint[1] alleges that, on April 20, 1971, Service Technology Corporation, a subsidiary of LTV Aerospace Corporation (the company), suspended and, on April 26, discharged Barbara B. Salvato because she joined or assisted District 37, International Association of Machinists and Aerospace Workers, AFL-CIO (the union), or engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Respondent answered, admitting the suspension and discharge of employee Salvato, but denying that its actions were motivated as alleged in the complaint.

Case 23-RC-3577, to the extent that is it before me, involves the validity of challenges to four ballots, including that of employee Salvato, cast in an election held May 13, 1971, among employees of respondent (designated as employer) in a unit composed of certain of the employer's employees in the visitors' services and public information section at the Manned Spacecraft Center of the National Aeronautics and Space Administration at Houston, Texas.

The issues raised by the answer in the unfair labor practice case, and by the ballot challenges in the representation case were ordered consolidated by the Regional Director

[1] Issued May 26, 1971, on a charge filed April 26, 1971.

and came on for trial before me on July 22, 1971, at Houston, Texas. All parties were represented; they were afforded an opportunity to adduce evidence, cross-examine witnesses, and argue on the facts and the law.

During the trial the parties agreed that the ballot of Richard Hopkins, challenged because his name was not on the voting eligibility list, should not be counted. The union withdrew its challenge to the ballot of Mary Tucker and agreed that her ballot be opened and counted. The only challenges to be resolved herein are the union's challenge to the ballot of Patricia Hopkins on the ground that she is a confidential secretary and the Board agent's challenge to the ballot of Barbara B. Salvato on the ground that her name was not on the voting eligibility list.

Briefs filed by the General Counsel, by counsel for the union, and by counsel for the respondent-employer have been considered.

For the reasons hereinafter set forth, I find that neither Hopkins nor Salvato was a confidential employee; that the company's discharge of Salvato violated Section 8(a)(3) and (1) of the Act; and that both their ballots should be counted.

Upon the entire record herein, including the demeanor of the witnesses while testifying, I make the following:

Findings of Fact

1. The parties to the unfair labor practice case

Respondent, as its name shows, is a subsidiary of LTV Aerospace Corporation and is a Delaware corporation. During the year preceding the issuance of the complaint, it purchased and had delivered to its operations in the State of Texas, from points in the United States outside that state, goods and materials valued in excess of $50,000.

Barbara B. Salvato, an employee of respondent, filed the charge in Case 23-CA-3946-1.

2. The representation proceeding

Upon a petition filed by the union, and after a hearing, the Regional Director ordered that an election be held in a unit of the employer's employees consisting of:

> All Visitor Services Section, Public Information Section and Exhibits Section employees performing services for the Employer at the National Aeronautics and Space Administration's Manned Spacecraft Center, Houston, Texas, including full-time and regular part-time escorts, administrative clerks, exhibits specialists, clerk expediters, exhibits schedulers, research writers and communications coordinators; excluding fabricators, refurbishers and warehousemen under the Exhibits Section, the secretary to the project manager, guards, watchmen and supervisors as defined in the Act.

The election was held, as ordered, on May 13, 1972.[2] The tally of ballots states that there were approximately 17 eligible voters and that no void ballots were cast; that 8 votes were cast for the union and 6 against it; that 4 ballots were challenged and that the challenges were sufficient in number to affect the results of the election. The details of the four ballot challenges are as follows:

---

[2] All dates herein not otherwise specified are 1971.

Name	*Job classification*	*Challenged by*	*Reason*
Richard Hancock	Escort	Board agent	Not on list
Patricia Hopkins	Escort since April 3, 1971; previously secretary to Lockridge	Union	Contends she is a confidential secretary
Barbara Salvato	Exhibit scheduler	Board agent	Not on list
Mary Tucker	Exhibit scheduler	Union	Contends she is a confidential secretary

On June 9, the Regional Director ordered that a hearing be held on the issues raised by the challlenged ballots and that the hearing be consolidated with the trial of the unfair labor practice for decision by the Trial Examiner.

3. Background

(a) *The company's operation*

By contract with the National Aviation and Space Agency (NASA), an agency of the United States Government, the company has undertaken to provide visitors' services, public information services, and an exhibit display at the Manned Spacecraft Center at Houston. The Center consists of a large number of buildings but only four of which, containing the exhibit displays, are open to the public. On guided tours, conducted by company employees, two or three additional buildings may be visited.

The company's offices for the visitors' and public information services are housed in Building 1, which consists of two single-level structures connected by an open walkway. One of these structures, containing an auditorium and some office space, is designated as Building 1, Auditorium, and the other, containing additional office space, is designated as Building 1, Administration.

The company's contracts for visitors' services are highly detailed and have been altered from time to time. The current contract became effective April 1, 1971. The company calls its organization for the performance of these services a "project"; it is directed by a "project manager" and employs, in addition to the manager, about 33 persons, including four supervisors. The four supervisors direct separate subdivisions devoted to visitors' services, exhibits, public information, and the Apollo 11 tour.

(b) *The union's organization*

In 1968 the union organized the six employees in the exhibits section who fabricate, erect, and refurbish the exhibits, and it was certified as their representative November 13, 1968. The collective-bargaining contract covering these employees was signed, effective April 14, 1969, for a term ending April 13, 1971, which is automatically renewable from year to year in the absence of notification of proposed change or termination.

Early in 1971, organizational activity began among the other employees in the project and, on February 19, 1971, the union filed a petition requesting an election in a unit consisting of the clerical employees, the exhibits coordinators, the escort officers, and the schedulers. The petition states that a request for recognition had been made on February 5 but that no reply had been received.

On February 23, the Acting Regional Director issued notice of a representation hearing to be held March 11; the company requested a postponement; the hearing was rescheduled for March 26; and it was held on that day. On April 13, the Regional Director issued his decision; he found appropriate a unit along the general lines of that requested by the union and he resolved several issues between the parties, including a finding that the secretary to the project manager was a confidential employee who should be excluded from the unit.[3]

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[3] The Regional Director noted that, after April 1, the secretary to the project manager would devote 50 percent of her working time to that function and the other 50 percent as an exhibits scheduler. He held that, since she would still have access to all personal files, to the confidential supervisory manual, and would type contract proposals and notes concerning bargaining sessions. [sic] she would still be acting "in a confidential capacity to the person who determines and effectuates management policies in the field of labor relations" and should be excluded. He cited, as his authority for this determination, *National Cash Register Company*, 168 NLRB 910.

The election was set for May 13, and the employees designated as eligible to vote were those employed during the pay period immediately preceding the April 13 date of the decision. This, all parties agreed, was the week ending Sunday, April 11. The election was held as scheduled, with the result set forth above.

(c) *Mrs. Salvato's employment*

Barbara B. Salvato was first employed by the company in May 1967 as a temporary employee and worked until the middle of August. She was again employed for 2 weeks in December of that year as a temporary scheduling clerk under the supervision of J. Prescott Lockridge. In February 1968 she was employed as a regular scheduling clerk, again under Lockridge's supervision, and worked until she resigned in September of that year. Two weeks later she was again hired, this time as a bookkeeper and secretary to John Heely, the project manager. Heely became ill in November and, in May 1969, Lockridge became project manager. Mrs. Salvato retained her position as bookkeeper and secretary to the project manager but, in January 1970, by reason of the merger of several of the company's contracts with NASA, her payroll and accounting functions were moved elsewhere and her duties were reduced to checking timecards, answering the telephone, and typing an occasional letter. She found this boring, so she requested and, in May 1970, received a transfer to the exhibits section as its scheduler, where she was under the supervision of Colin E. Kennedy.

The parties stipulated that Mrs. Salvato's duties as the exhibits scheduler were accurately described in the Regional Director's decision as follows:

> The exhibits scheduler maintains a list containing all exhibit inventory and performs all correspondence deal-

ing with the exhibits. She communicates directly with the transportation people who handle the shipping of the various exhibits. In this regard, she writes letters, sets up files for each exhibit show and keeps a log of all these activities.

She held this position, with the changes after April 1 described below, until her suspension and discharge in the latter part of April 1971.

(d) *The situation after April 1*

When Mrs. Salvato's request was granted in January 1970 and she was transferred out of the position of secretary to the project manager, that job was assigned to Mrs. Patricia Hopkins and she held it until April 1, 1971.

The staffing specifications in NASA's request for bids on the contract for visitors' and public information services beginning April 1 eliminated the position of secretary to the project manager. The company's bid was successful and therefore, as of that date, Project Manager Lockridge could no longer have a secretary.[4] Mrs. Hopkins was transferred to the visitors' services section as an escort. The section was then under the supervision of John A. Rademacher and its offices were in Building 1, Auditorium.

Despite the elimination of the position of secretary to the project manager, it appears that Lockridge continued to require some secretarial assistance. This requirement was forecast, as noted, in the testimony at the representation hearing but whether the predicted method of its solution was actually followed is one of the issues in this case. The manner in which Lockridge's secretarial needs were actually supplied forms the basis for the union's challenge

[4] It is presumed that this change was made the subject of testimony in the representation hearing on March 26, since a portion of the Regional Director's decision, quoted above, deals with it.

to Mrs. Salvato's ballot and the validity of her discharge from the company's employment. Accordingly, this subject is discussed hereafter in detail.

4. The challenged ballots

(a) *The issues*

The ballot of Mrs. Hopkins was challenged by the union on the ground that she was, at the time of the election, a confidential secretary. The ballot of Mrs. Salvato was challenged by the Board agent because her name was not on the list of eligible voters.

Although Mrs. Salvato was in the company's employ during the week ending April 11, and the General Counsel conceded that the list of eligible voters was typed by her, so that she was then still in the company's employ, there is nothing in the record which directly accounts for the absence of her name from the list. The Regional Director's decision, however, states that:

> As of April 1, 1970 [sic], the project manager's secretary was to start spending 50 percent of her time as an exhibits scheduler and the remainder of her time performing work for the project manager.

and he excludes that person from the unit as a confidential employee. Although Mrs. Salvato testified that she had heard about the plan from someone present at the hearing, as reflected in the decision, it appears to contemplate the transfer of Lockridge's secretary, i.e., Mrs. Hopkins, to the exhibits scheduler position so that she could devote 50 percent of her time to that work and the remainder of her time to Lockridge. In any event, the company's brief states that, had Mrs. Salvato been in its employ at the time of the election, she would have been ineligible to vote by reason

of her status "as a confidential secretary." Accordingly, the issue concerning her status between April 1 and her discharge on April 26 is adequately raised for determination herein.

(b) *Mrs. Hopkins*

Prior to April 1, Mrs. Hopkins was Lockridge's secretary with full access to the personnel files of all employees in the project and to his notes concerning bargaining with the union representing the shop employees. Based upon the situation prior to April 1, the Regional Director held that the person in this position — then Mrs. Hopkins — should be excluded from the unit as a confidential employee. It is the company's contention that, after April 1, Mrs. Hopkins no longer performed such duties for Lockridge and that she was entitled to vote as an employee included in the unit.

Mrs. Hopkins testified that, after April 1, the only "clerical work"[5] she performed for Lockridge was on the one occasion when she typed some corrections to one of his monthly reports. She testified that Mrs. Salvato had done the original typing of the report but had become ill after lunch and left the office. She did this typing, Mrs. Hopkins testified, at Mrs. Salvato's desk and on Mrs. Salvato's typewriter because the report had been typed there. She also testified that the request that she perform this work came from Lockridge through her supervisor, John A. Rademacher.

Lockridge also testified that the only typing which Mrs. Hopkins did for him after April consisted of those corrections to the report typed by Mrs. Salvato. He further testified, however, that there were a number of other occasions when he asked that Mrs. Hopkins come to his office

[5] She defined "clerical work" as "typing and filing."

for other reasons, and he stated that she was more familiar with the files than he was so that he was sure that there were a number of occasions of that sort. In addition, Lockridge testified, there were occasions when he consulted her to determine whether the necessary procedures had been completed to effect changes in the status of project employees.

From Lockridge's testimony, it appears that the services Mrs. Hopkins performed for him were substantially more extensive than shown by her testimony and I infer that her effort to minimize her secretarial work was both to counter the challenge to her ballot and to support the company position that it was Mrs. Salvato who was Lockridge's "confidential secretary."

Rademacher, through whom Lockridge made his requests for Mrs. Hopkins' services, testified that during the first week she was in his section the only work she did for him was to accompany one tour, which lasted about an hour and a quarter, and that all the rest of that time she spent helping Lockridge. He also testified that Lockridge asked him several times that first week to send Mrs. Hopkins to his office, refusing Rademacher's offer to send someone else when Mrs. Hopkins was not available. Rademacher testified that during the period Mrs. Hopkins was under his supervision,[6] she devoted 25 to 30 percent of her time to helping Lockridge.

Mrs. Salvato, whose office as exhibits scheduler was almost directly across the corridor from Lockridge's office,

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[6] At one point Rademacher testified that his employment with the company was terminated on April 23 and, at other points, that it was April 12 and April 25. Mrs. Salvato also testified that he was discharged April 23. Since his testimony indicates that he was Mrs. Hopkins [sic] supervisor for more than a single week and, since April 23 was a Friday, that date is accepted as the most likely one.

testified that between April 1 and April 20 she saw[7] Mrs. Hopkins working at her old desk in Lockridge's office about 25 percent of the time.

Based upon all of the foregoing, I reject the testimony of Mrs. Hopkins that her only work for Lockridge consisted of the corrections to the one report originally typed by Mrs. Salvato and I find that, during the first 3 weeks of April, she spent a substantial portion of her time, at least 15 to 20 percent, assisting Lockridge in his administrative work as project manager. The legal effect of this finding is discussed below.

(c) *Mrs. Salvato*

Between May 1970, when she ceased to be secretary to the project manager, and April 1, 1971, Mrs. Salvato did no work directly for Lockridge. Her work during that period, the parties agreed, was accurately described in the Regional Director's decision set forth above and Mrs. Salvato testified, without contradiction, that she performed these duties until her suspension on April 20.

Although Lockridge first testified that Mrs. Salvato, after April 1, performed all the work that Mrs. Hopkins had performed for him prior to that date, he conceded that Mrs. Salvato was unfamiliar with the files in his office and that, for this work, he called upon Mrs. Hopkins. Lockridge also testified that Mrs. Salvato "was aware of the fact she was taking on this function" but he conceded that he had not previously told her about it and admitted that the first time he discussed it with her was "some time in the first week of April" when he brought some typing work to her and told her that "since she was going to be doing my work," they "were going to have to get along."

[7] Mrs. Salvato testified that the office in which she worked was across the corridor from Lockridge's office and, although she could not see into his room from her desk, she could see his door.

Despite Lockridge's several descriptions of Mrs. Salvato's work for him in the most expansive terms, the record shows that the total of her "secretarial" services for him consisted of typing the folllowing documents:

1. "Notes from IAM Exhibits Shop Negotiations, 31 March 1971"

This document consists of three pages of double-spaced material totaling 63 lines of typing. The first two pages are entirely devoted to a description of statements made by the negotiators at the meeting, but the third page reads as follows:

> NOTES
>
> Apparently the union is looking for increases in the 50 cents — 60 cents per hours neighborhood with the company assuming all insurance costs.
>
> We assume no problems will arise on uniforms, letter of understanding and vacation.

2. "Meeting with Shop — IAM reps., 2 April 1971"

This document consists of two pages totaling 53 lines of typing. Again, a substantial part of the memo describes statements which were made at the meeting, but the second page contains the following:

> Not ready at this time to make a counter proposal until IAM has given indication that they are willing to move. We do have a little room to move but need an indication from IAM. The wage increases proposed are way out of our reach and we cannot even get close.
>
> Union would give indication according to Green that 40 cents (Special Purpose) would not be exceeded for the second year.
>
> We are unalterably opposed to our paying all of the insurance. The Company take the position that the wage demands by the bargaining unit are exorbitant, not realistic and will not be considered by the company

> or recommended to NASA. The company is opposed to paying the entire insurance.

3. "Exhibits Shop Negotiations/NLRB Mediation Hearings/13 April 1971"

This document of two pages, containing 37 lines of typing, starts: "Problems keeping union and management apart" and lists the respective union and company positions on five matters. Most of the remainder of the memo sets forth the substance of some oral exchanges between the representatives concerning a temporary extension of the contract and arrangements for further meetings, but it ends with the following:

> We feel that A. B. Green is under more pressure on the April 21 elections with the Lockheed group than we had realized, or he would not have agreed to this concession.

The foregoing documents, both Lockridge and Mrs. Salvato testified, were typed by her from handwritten notes made by Lockridge and he testified that she was not present at any of the meetings described.

In addition to the foregoing, the parties stipulated that Mrs. Salvato also typed the following two documents dealing with labor relations:

1. Memo to Lockridge from C. F. Kennedy, labeled "Private" and dated April 12. Kennedy is the exhibits supervisor and was Mrs. Salvato's regular superior. The memo, on two pages and totaling 43 lines, begins: "Should a strike of the exhibit shop production personnel occur on Friday, April 16, 1971, it would effect [sic] the following planned projects:" and it lists the matters that would be affected. The memo is signed by Kennedy and the identifying initials, "CEK: bbs," indicate that it was dictated by Kennedy to Mrs. Salvato.

2. The list of eligible voters in the Board election in this case, consisting of 18 names and addresses and totaling 60 typed lines on three pages. This list, the General Counsel conceded, was typed by Mrs. Salvato but the record does not show from whom she received her instructions concerning it.

Mrs. Salvato estimated that her work for Lockridge took about 5 percent of her time. Since there were between 13 and 14 working days of 8 hours each between April 1 and and Mrs. Salvato's suspension,[8] her total working time was between 104 and 112 hours. Her 5-percent estimate indicates that she spent 5 or 6 hours typing the documents set forth above. Since she had been secretary to the project manager and her work as exhibits scheduler included typing, it may be assumed that she is a reasonably competent typist. As such, 5 or 6 hours appears adequate for the typing indicated and her estimate was not disputed. Accordingly, I find that Mrs. Salvato devoted aproximately 5 percent of her working time to the typing of material connected with labor relations and that the work involved some confidential material.

(d) *Resolution*

The union supports its challenge to Mrs. Hopkins' ballot with the argument that "she continued to perform work for Mr. Lockridge after April 1" and that it is the Board's policy "to exclude the confidential secretary" citing, as authority, *National Cash Register Co.*, 168 NLRB 910. The union contests the challenge to Mrs. Salvato's ballot with the statement that the company misrepresented its intentions in the representation hearing and that the Regional Director's decision, excluding from the unit the employee ex-

[8] Lockridge testified that it was in the afternoon when he called Mrs. Salvato into the meeting during which she was suspended and the record shows that this occurred on April 20.

pected to devote 50 percent of her time to acting as Lockridge's secretary, was based upon that misrepresentation.

The company, with respect to both ballots, relies upon its interpretation of the facts to argue that Mrs. Salvato was, and Mrs. Hopkins was not, Lockridge's secretary and that, therefore, Mrs. Salvato should be excluded from the unit as a confidential employee while Mrs. Hopkins should be included.

Both sides appear to base their positions on an "all or nothing" assessment of the status of these employees but Board decisions appear to treat the problem with greater discrimination. There are two elements that must be considered in determining whether particular employees should be excluded from a unit as "confidential": first, the executives to whom the employees are attached must be "persons who formulate, determine, and effectuate management policies in the field of labor relations"[9] and second, the employees must "assist and act in a confidential capacity to [those] officials."[10] *National Cash Register, supra,* represents the simplest situation: the employees involved were the 10 private secretaries to the company's division managers, each of whom had 1,000 to 3,000 employees under his supervision. The division managers participated in contract negotiations and in the grievance procedure, and they prepared proposals for inclusion in the collective-bargaining contract. Their private secretaries had custody of the grievance files, and prepared notes from which contract proposals would be made. These managers, the Board held, were such officials, and their secretaries were confidential employees. Accordingly, it excluded them from the unit.[11]

[9] *The B. F. Goodrich Co.*, 115 NLRB 722, 724.

[10] *Westinghouse Air Brake Company*, 119 NLRB 1391, 1395.

[11] See also: *Sears Roebuck and Co.*, 193 NLRB No. 48, involving the personnel clerical assistant.

Although the record before me casts doubt on whether the scope of Lockridge's duties made him one of the persons who, on behalf of the company, "formulate, determine and effectuate management policies in the field of labor relations," so that another employee acting in a confidential capacity to him should be excluded from the unit as a confidential employee,[12] the Regional Director held that he was. The Regional Director further stated that after April 1, Lockridge's secretary, although she would devote only 50 percent of her time performing work forhim, would "have access to all personnel files" and he held that she would be a confidential employee.

In any event, the company's arrangement for providing Lockridge with secretarial services, as projected in the representation a hearing, was not brought into existence: Lockridge's secretary was not transferred to the position of exhibits scheduler and Mrs. Salvato, who was the exhibits scheduler both before and after April 1, neither devoted half her time to acting as Lockridge's secretary nor did she "have access to all personnel files."

Based upon the small amount of typing performed by Mrs. Salvato for Lockridge, her lack of access to any of

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[12] It is to be noted, from the memoranda typed by Mrs. Salvato dealing with negotiations with the union as representative of the 6 exhibit fabricators and refurbishers in the approximately 25 employees supervised by Lockridge, that the negotiations were conducted by McKay, director of labor relations, and Lockridge's only function, so far as this record shows, was to make notes concerning the proceedings. Such limited participation in union negotiations, even when accompanied by his authority to participate in grievance proceedings involving the employees he supervised, does not necessarily make him a person who, on behalf of the company, "formulates, determines, and effectuates management policies in the field of labor relations." See *Westinghouse Electric Corporation*, 163 NLRB 503, enfd. 398 F.2d 669 (C.A. 6; 1968); *Holly Sugar Corporation*, 193 NLRB No. 150.

his files, the physical separation of her working area from his office, and her complete lack of other contact with matters relating to labor relations, lead to the conclusion that she cannot properly be designated as a person acting in a "confidential" capacity to Lockridge. The amount of typing she performed for him could just as easily have been assigned by Lockridge to any employee on the project with minimal typing capacity — or spread out among several — and, unless consideration is given to the quantity of the services performed, each employee so involved would be thereby excluded from the unit. This result would be absurd.

The situation with respect to Mrs. Salvato is practically identical with that of the employee involved in *Grocer's Supply Company, Inc.*, 160 NLRB 485, 489, described in the decision as follows:

> The . . . employee . . . does occasional secretarial work for the president of the Company. This employee does not have a desk in the president's office, has no access to labor relations files, and is primarily concerned with other duties.

The Board included this employee in the unit.

Accordingly, I find that Mrs. Salvato did not occupy a position that should be designated as "confidential" and that the company's contention to that effect must be rejected.

Although Mrs. Hopkins, it has been found, devoted a substantial amount of time to work for Lockridge, it was nevertheless a relatively minor part of her total working time and it was likely to decrease rather than increase. She did, it is true, have access to Lockridge's files, including those relating to personnel matters and such griev-

ances as might arise. These items, however, are insufficient to make her an employee acting and assisting Lockridge in a confidential capacity[13] and I find that she is not.

Accordingly, the union's challenge to Mrs. Hopkins' voting should be overruled and her ballot counted.

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[13] The following, from fn. 4 of the Board decision in *The Santa Fe Trail Transportation Company*, 119 NLRB 1302, 1304, appears to cover this situation:

> The secretary to the chief clerk to the general manager substitutes for the secretaries to the labor relations officials indicated above when the latter are on vacation or ill, which she estimated would be about 25 percent of her time. However, of this 25 percent only about 10 percent of her time is consumed in work considered confidential. The secretary to the freight auditor takes dictation from the latter and head agents reports clerk but does no work concerning contracts or grievances. The secretary to the assistant general auditor testified that none of the dictation she takes involves greivances or negotiations of labor contracts. She substitutes for the auditor's secretary when the latter is on vacation but she did not recall whether the dictation related to labor matters. The secretary to general claims agent does the same work as the secretary to the freight auditor. We find that these secretaries are not confidential employees and shall include them in the unit. Likewise, we find that the secretaries to the traffic managers, the sales manager and the general storekeeper are not confidential employees and shall include them in the unit. The Employer would exclude the head file clerk who has charge of files in the general manager's office. We find that this fact, for this reason alone, does not make him a confidential employee, and shall include him in the unit. See *B. F. Goodrich* Co., 115 NLRB 722.

Also pertinent is the following, from *Swift & Company*, 129 NLRB 1391, 1393:

> The garage stenographer does substitute, for about 10 percent of her time, for the confidential secretary to the plant superintendent. However, the garage stenographer spends only a fraction of that time in work which might be considered confidential. We find she is not a confidential employee.

See also, as to mere access to the files, *Hotel Employers Association of San Francisco*, 159 NLRB 143, 150.

5. The suspension and discharge of Mrs. Salvato

a. *Background*

Barbara B. Salvato, as noted above, was a comparatively longtime employee of the company. There is no evidence that her services had been unsatisfactory.[14] She was Lockridge's secretary and Lockridge was the exhibits supervisor at the time the exhibits fabricators were organizing. Mrs. Salvato testified that at that time Lockridge said to her: "I should fire each one of those sons of bitches for going union." Lockridge, when questioned on the subject, admitted that he may have made some such statements, but he insisted that Mrs. Salvato was in agreement with him.

The organizing campaign among the clerical and escort employees began in January 1971 when Mrs. Salvato and Hancock, one of the escorts, met with some union officials at Mrs. Salvato's home and she signed an authorization card. She took additional cards for signature by others and she testified that she obtained some signatures on them during lunch periods in the cafeteria.

Lockridge conceded that he knew about the organizing campaign when the company received what he called "a letter stating that there would be a possibility of an election"[15] and that he began discussing the matter with his supervisors at their weekly Friday meetings. He insisted, however, that "for a long time" he had "no suspicion of

[14] Rademacher testified that on one occasion Lockridge had asked the exhibits supervisor to see that Mrs. Salvato limited her lunch periods to the prescribed 30 minutes because she had occasionally been 5 or 10 minutes late in reporting.

[15] A notice of representation hearing was mailed to the company and to other interested parties, on February 23, 1971. Lockridge had been through a representation proceeding involving the exhibit fabricators, and I find that this is the "letter" to which he referred.

who was involved in it" and he testified that he first "knew" of Mrs. Salvato's involvement at the time of the incident with Mrs. Kite: i.e., April 19. This latter statement is obviously quibbling, since Lockridge testified that he suspected that Mrs. Salvato was involved "because of a very strong change in attitude" at a time he fixed as April 1. Moreover Rademacher, one of the supervisors, testified that it was at only the first of the supervisors' meetings, which he fixed at 2 or 3 weeks before the representation hearing,[16] that Lockridge expressed lack of knowledge of those involved but that thereafter he identified Mrs. Salvato, Hancock, and Driscoll as the principal organizers of union activity. Based upon the foregoing, I find that, prior to the date of the representation hearing, Lockridge was aware of Mrs. Salvato's involvement in the self-organizational activities among the clerical and escort employees.

b. *Mrs. Salvato's talk with LeBecca Kite*

Mrs. LeBecca Kite became employed by the company February 23, 1971, and worked in the public information library until the last week in May, when she quit.

She testified that during the early part of her employment she frequently lunched with Mrs. Salvato and Mae Ingraham, another clerk in the library, and that they had two or three discussions about the upcoming election.[17] Both the others, she testified, were very prounion and they

[16] Rademacher, testifying that he did not know the exact date of this first meeting, at another point placed it as "the last of March or beginning of April." On the basis of Lockridge's testimony that, soon after he learned that an election was possible, he began discussions with the supervisors on the identity of the employees involved, I accept the earlier date as the more probable one.

[17] Although the election was not ordered until April 13, she referred to these discussions as involving the fact that "there was going to be a vote about the union."

asked her several times to sign a union card. Finally, she testified, in a conversation about the middle of March, she refused to sign, stating that she felt that the card authorized the union to bargain for her but that she had not reached a decision.[18] After stating her refusal, she testified, she went to Lockridge, whom she had known prior to her employment, and asked him whether he knew that there was union activity going on within the project. Lockridge said that he knew about it and, when Mrs. Kite asked him about the union, he said that it already represented some company employees, that the company had dealt with it for some time, and that it was a very reputable union. She had no further conversation about the union, she testified, until April 19.

Just before the close of the working day on April 19, Mrs. Salvato and Mrs. Kite met in the ladies' room. Both agree that there was a brief and trivial exchange about Donna Lockridge, a mutual friend and the divorced wife of the project manager. As they were walking out of the restroom, Mrs. Salvato testified, Mrs. Kite said: "We haven't heard from the Union"; she answered "I imagine you will," and they parted.

According to Mrs. Kite, however, after they had completed the exchange of trivialities, Mrs. Salvato said to her:

> "I know that we are not supposed to discuss Union on Company time, but," she said, "I am not going to be able to vote, but it doesn't matter. I want you to know that if you can't vote for the union it will be best if you don't vote at all."

[18] Mrs. Salvato denied asking Mrs. Kite to sign a card but agreed that there had been lunch table discussion about the union and that Mrs. Kite made it clear that she was against the union.

Mrs. Kite testified that she answered:

> You want me to be apathetic toward the situation?

and that Mrs. Salvato replied:

> "Well, we think you are just too new here to know what is going on. And you are being buttered, they are buttering you up, they are making promises they won't keep."

To this, Mrs. Kite testified, she said:

> Well, so far I have been told I should be in favor of the Union, but I have no reason for it.

and Mrs. Salvato answered:

> Well, we are supposed to receive some literature in the mail.

Mrs. Kite testified that she pointed out that it was a week since she had given her address but she had not received anything. She testified that Mrs. Salvato repeated the statement that if she couldn't vote for the union she shouldn't vote and that Mrs. Salvato ended by saying "We have our own loyalties," at which time another employee entered the lounge and, Mrs. Kite testified, she left.[19]

When she went back to her desk, Mrs. Kite testified, she was "stunned and angry"; she related the exchange to

[19] Although Mrs. Kite's account of the conversation, quoted Mrs. Salvato as opening it — to one she knew as an opponent of the union — with the statement "I know that we're not supposed to discuss union on company time", strains credulity, it seems clear that there was more to the exchange than the few words disclosed by Mrs. Salvato. There was no rebuttal of Mrs. Kite's testimony by Mrs. Salvato and, accordingly, the conversation is found to have occurred as described by Mrs. Kite.

a fellow worker who asked whether she was going to tell anyone about it; and she said she thought she ought to tell Lockridge. As she was leaving the building, she stopped at Lockridge's office but he had some people with him so she said she had "something important" she wanted to talk with him about. Lockridge said he'd talk with her later so she went home and, about an hour later, Lockridge stopped at her apartment: she told him what had happened and said that she was concerned about it. She testified that Lockridge asked her whether she would make a statement and she said she would; that Lockridge said he didn't know whether they would need it but suggested that she prepare it that evening while everything was fresh in her mind and, if needed, she could type it when she reached the office. She testified that Lockridge told her the next morning that he would need the statement so she typed it and gave it to him.

Mrs. Kite testified that she was not "scared" by Mrs. Salvato's remarks, but that she was angry. She also testified that she cast her ballot in the election and that there was no "incident."

Lockridge's testimony concerning Mrs. Kite's report to him was that, when he saw her at her apartment that evening, she said "she had been threatened in her job by Mrs. Salvato" and he testified that she said that "possibly she had been threatened physically." As contrasted with these conclusions, however, the specific language of her conversation with Mrs. Salvato, as he testified she related it to him, was generally the same as that described by Mrs. Kite in her own testimony. Lockridge testified that he requested, that same evening, that she type out her statement as soon as she reached the office the next morning.

In her testimony, Mrs. Kite used the words "stunned," "angry," "concerned" and "upset" to describe her reaction, but she testified that she was never "scared" and that she "wouldn't say [she] was frightened." Lockridge's use of the word "threatened" and the phrase "possibly she had been threatened physically," therefore, represent his own contribution to the exchange between the two employees. Not only do I reject Lockridge's testimony on this subject, but I regard it as an effort on his part to exacerbate the tone of the incident to justify his charge of misconduct by Mrs. Salvato.

After talking with Mrs. Kite, Lockridge testified, he called Mitchell, the company's chief of personnel, and then talked with McKay, company chief of industrial relations. He testified that he also discussed the matter with company counsel.

c. *Suspension and discharge*

During the afternoon of the following day, Lockridge asked Mrs. Salvato to come to his office. She did so and found Colin Kennedy, the exhibits supervisor, and Charles Mitchell, the company's chief of industrial relations, with him. According to Mrs. Salvato, Lockridge told her that, since she "was his confidential secretary and had been involved in union activities on company time, [she] would have to be placed on a three-day suspension without pay pending further investigation."

Mrs. Salvato testified that she said she didn't know she was his confidential secretary and asked whether he had told her so, whereupon Lockridge answered: "I thought I did." She testified that Mitchell "kept asking" her if she had anything else to say and she told him that she didn't think it would make any difference what she said because she felt that they were holding a "kangaroo court;" that

obviously someone "had it in" for her there and she asked who and what it was. She testified that she received no answer except that Kennedy said he'd call her on Friday. Lockridge then took her identification badge and told her that Kennedy would escort her out to her car.

Lockridge testified that he told Mrs. Salvato that she was being suspended "for carrying on illegal union activity on company premises and company time" but did not ask her for any statement of her position because he did not want to bring Mrs. Kite's name into it at that time. He further testified that Mrs. Salvato denied ever having been in volved in union or organization activities and stated that she had been, and still was, opposed to the union.

On Friday, Mrs. Salvato testified, Mitchell called her at home, said he had her paycheck and asked whether he should mail it or whether she would pick it up. He also said to her: "We should have a decision by Monday." Mrs. Salvato told him to hold her check and that she would pick it up on Monday.

On Monday, Mrs. Salvato testified, she went to Mitchell's office, which was located in another building, and she saw Mitchell with Colin Kennedy, her supervisor. Mitchell said that the company "found it necessary" to terminate her "due to the threats [she] had made and the contacts[20] [she] had made." She again asked for the particulars of the conduct with which she was charged but Mitchell refused to answer. She was then escorted to the personnel office to obtain her check.

At the office she found Personnel Manager McFatter looking through her file. He asked her to tell her side of

[20] This reference is, I find, to the fact that, although regarded as confidential employee, she had assisted the union's organizational effort.

the story and she said he was the first person who had asked for it. She told him that she had mentioned the union only twice: once when an employee in her office named Stodghill had asked her a question about it and she told him she would not discuss the union on company time, and the other in her conversation with Mrs. Kite. McFatter told her that Stodghill had "come to her defense" and had confirmed her account of their conversation but he did not say anything in reply to her statement about the Kite incident. He then handed her the paycheck with a termination slip on which was written "violation of company rules, code 19". Mrs. Salvato testified, without contradiction, that she had never seen a copy of any company rules covering employee conduct and that her only knowledge of company procedures was obtained when she had done some typing involving directions concerning hiring, sick leave, and vacations. The company did not introduce its rules into evidence and there is nothing in the record to indicate the meaning of "code 19".

d. *Resolution*

The General Counsel contends that the company's stated reason for discharging Mrs. Salvato was a pretext and that its real reason was her activities on behalf of the union. Respondent contends that Mrs. Salvato "was discharged for a breach of company rules in threatening Mrs. LeBecca Kite."[21]

The record shows, beyond dispute, that the discharge of Mrs. Salvato was based upon an incident involving union activity and that it was known by the company to have involved such activity. Unless there was in it, therefore,

[21] Although no company rule was introduced, it may be assumed that a substantial "threat," considered on the basis of its terms, as well as the type of employees and employment involved, might constitute conduct justifying discipline or even discharge.

some unprotected activity justifying the discharge of Mrs. Salvato, that discharge violated Section 8(a)(3) of the Act.

Insofar as the company's justification for the discharge is based upon union activity "on company time," it cannot be sustained, any more than a rule prohibiting such activity in those terms could justify discipline or discharge.[22]

Consideration of the language used, according to Mrs. Kite's testimony, in the conversation between her and Mrs. Salvato leads to the conclusion that nothing in it can reasonably be construed as a threat.[23] There is nothing inherently coercive about urging abstention from voting and there is no claim that the words meant anything more than that.

The record also shows that the term "threat" was introduced to characterize the exchange solely by Lockridge: Mrs. Kite never used it and she testified that she was not "scared". That Lockridge recognized the term as his own contribution to the incident, that he was excalating [sic] it, and that his position was vulnerable are, I am convinced, confirmed by his introduction of the additional bases for Mrs. Salvato's discharge; that she had carried on union activity on company time and that, as a confidential employee, she had engaged in union activity.

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[22] *Republic Aviation Co.* v. *N.L.R.B.*, 324 U.S. 793; *Campbell Soup Co.* v. *N.L.R.B.*, 380 F.2d 372 (C.A. 5) enforcing 159 NLRB 74, 82.

[23] In *C & D Sportswear Corporation*, 189 NLRB No. 5, and *Goldblatt Bros., Inc.*, 174 NLRB No. 114, the employee statements used as the basis for the discharges contained words which, taken out of context, could be construed as threats of bodily harm. In each case, however, the Board held that the statement, in context, was not a threat and that the use of it by the employer to justify the employee's discharge was a pretext to rid itself of an employee engaged in organizational activities. In this case, on the basis of Mrs. Kite's version of the conversation, there are no words that could possibly be construed as a threat, as that term is reasonably understood, and there is no claim that the words masked a hidden meaning.

It follows, from the foregoing, that I find that there is nothing in the conversation between Mrs. Kite and Mrs. Salvato that can be construed as a threat; I find that the conversation between them represented protected activity on the part of Mrs. Salvato, in that she was entitled to carry on the conversation when and where she did and that her employee status was not such as to debar her from that activity. The various reasons assigned by the company for discharging Mrs. Salvato were, I find, pretexts to mask its real reasons for her discharge and that the real reasons were retaliation for her organizational activities and the desire to rid itself of a union adherent. In reaching this conclusion, I also take into consideration the abruptness of the Company's action in suspending Mrs. Salvato [24] and the failure of its officials to request during their "investigation", Mrs. Salvato's version of the incident up which they were about to rely in justification of her discharge.[25]

The company's final contention, that Mrs. Salvato was a confidential employee outside the protection of the Act, is based upon the recent decision in *N.L.R.B.* v. *Wheeling Electric Co.*, 444 F.2d 783 (C.A. 4), setting aside 182 NLRB No. 33. There are, however, two overriding reasons why the company's argument must be rejected. In the first place, it has been found herein that Mrs. Salvato was not a confidential employee for any purpose, and second, in the case cited by the company, the decision of the Board, by which I am bound,[26] did not exclude the confidential employee from the protection of the Act and there is no indication

[24] *N.L.R.B.* v. *Montgomery Ward & Co.*, 242 F.2d 497, 502 (C.A. 2), cert. denied 355 U.S. 829.

[25] *Magic Chef, Inc.*, 181 NLRB No. 146, enfd. 443 F.2d 375 (C.A. 6).

[26] *Prudential Insurance Co.*, 119 NLRB 768; *Iowa Beef Packers*, 144 NLRB 615.

that the Board has changed its rule of decision to conform to that of the court in that case.

5. The Effect of the Unfair Labor Practices Upon Commerce

The activities of respondent, set forth in finding of fact 5, above, occurring in connection with its operations described in fact 1, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

6. The Remedy

Having found that respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the purposes of the Act.

Having found that respondent, by discharging Barbara B. Salvato for engaging in activities on behalf of the union, committed unfair labor practices, I shall recommend that it offer her reinstatement to the position she held on August 20, 1971, or, if that position no longer exists, to a position substantially equivalent thereto, without loss of seniority or other rights and benefits, and that it make her whole for any loss of compensation she may have suffered, computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and with interest as prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

In view of the nature of the unfair labor practices found herein to have been engaged in by respondent, which indicates its determination to interfere aggressively with its employees' rights of self-organization, I shall recommend

a broad cease-and-desist order herein.[27]

Upon the foregoing findings of fact and upon the entire record herein, I reach the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The union is a labor organization within the meaning of Section 2(5) of the Act.

3. At the time of the activities set forth in the Decision, J. Prescott Lockridge was a supervisor of respondent within the meaning of Section 2(11) of the Act and acted as its agent.

4. Barbara B. Salvato was and is an employee of respondent within the meaning of Section 2(3) of the Act.

5. By discharging Barbara B. Salvato because of her activities on behalf of the union, respondent discriminated against her to discourage her membership in the union and committed an unfair labor practice within the meaning of Section 8(a)(3) of the Act.

6. By the foregoing unfair labor practice, respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act and committed an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

7. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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[27] *N.L.R.B.* v. *Entwistle Mfg. Co.*, 129 F.2d 532, 536 (C.A. 4).

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[28]

ORDER

Respondent, Service Technology Corporation, a subsidiary of LTV Aerospace Corporation, its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in District 37, International Association of Machinists and Aerospace Workers, AFL-CIO, or any other labor organization, by discharging any employee or otherwise discriminating in his or her tenure of employment or any term or condition thereof.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, or to engage in concerted activities for the purpose of collective bargaining and other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Offer to Barbara B. Salvato immediate and full reinstatement to her former position or, if that position no longer exists, to a position substantially equivalent to that which she held immediately prior to April 20, 1971, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of wages in the manner

[28] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

set forth in the section of the Decision entitled "The Remedy."

(b) Notify immediately the above-named individual, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its offices in Building 1 of the Manned Spacecraft Center at Houston, Texas, copies of the attached notice marked "Appendix."[29] Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 23, in writing, within 20 days from the date of the receipt of this

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[29] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Decision, what steps the Respondent has taken to comply herewith.[30]

REPORT ON CHALLENGES

It having been found that neither Barbara B. Salvato nor Patricia Hopkins is a confidential employee who should be excluded from the unit, and that Barbara B. Salvato, notwithstanding her discharge, has continued to be an employee of the employer, it follows that they were both entitled to vote in the election held May 13, 1971. Accordingly, I recommend that the challenged ballots of Barbara B. Salvato and Patricia Hopkins be opened and counted; that a revised Tally of Ballots be prepared and served upon the parties; and that a certification issue in accordance with the result.

Dated at Washington, D.C. Dec. 22, 1971

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[30] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The trial held at Houston, Texas, on July 22, 1971, in which we participated and had a chance to give evidence, resulted in a decision that we had committed unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, and this notice is posted pursuant to that decision.

The National Labor Relations Act, as amended, gives all employees the following rights:

To organize themselves

To form, join, or support unions

To bargain as a group through a representative they choose

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all such activities.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT discourage employees from becoming or remaining members of District 27, International Association of Machinists and Aerospace Workers, AFL-CIO, or any other labor organization, by discharging any employee or otherwise discriminating in their tenure of employment or any term or condition thereof.

WE WILL offer Barbara B. Salvato immediate and full reinstatement to her former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of her discharge.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

SERVICE TECHNOLOGY
CORPORATION
A SUBSIDIARY OF LTV
AEROSPACE
CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

We will notify immediately the above-named individual, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Fourth Floor, Dallas-Brazos Building, 1125 Brazos Street, Houston, Texas 77002, Telephone 713-226-4296.

DECISION, ORDER AND DIRECTION

(Number and Title Omitted)

On December 22, 1971, Trial Examiner Sidney D. Goldberg issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.[1]

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and brief and has decided to affirm the Trial Examiner's rulings, findings, and conclusions[2] and to adopt his recommended Order.

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[1] Respondent's exceptions are directed essentially to the Trial Examiner's finding that Salvato was not a confidential employee under Board law and to his conclusion that she was unlawfully discharged.

[2] In the section of the Trial Examiner's Decision entitled "The Remedy," the Trial Examiner inadvertently stated a date as August 20, 1971, instead of the correct date, April 20, 1971. We correct this date to read April 20, 1971.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that Service Technology Corporation, a Subsidiary of LTV Aerospace Corporation, Houston, Texas, its officers, agents, successors, and assigns shall take the action set forth in the Trial Examiner's recommended Order.

DIRECTION

It is hereby directed that the Regional Director for Region 23 shall, pursuant to the Board's Rules and Regulations, within 10 days from the date of this Direction, open and count the ballots of Barbara B. Salvato, Patricia Hopkins, and Mary Tucker and thereafter prepare and cause to be served on the parties a revised tally of ballots, including therein the count of said ballots. In the event the revised tally is determinative, the Regional Director shall issue an appropriate certification.

Dated, Washington, D.C. May 11, 1972

John H. Fanning, Member
Ralph E. Kennedy, Member
John A. Penello, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

No. 73-934

FEB 3 197
MICHAEL RODAK, JR., C

In the Supreme Court of the United States

OCTOBER TERM, 1973

SERVICE TECHNOLOGY CORPORATION, A SUBSIDIARY OF LTV AEROSPACE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Department of Justice,
Washington, D.C. 20530.

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Washington, D.C. 20570.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b) is reported at 480 F. 2d 923. The Board's decisions and orders (Pet. App. 1c-13c, 1d-38d) are reported at 196 NLRB No. 160 and 199 NLRB No. 102.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2b-3b) was entered on July 30, 1973, and a petition for rehearing was denied on November 5, 1973 (Pet. App.

1a). The petition for a writ of certiorari was filed on December 17, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that Barbara Salvato was not a confidential employee and that she was discharged because of her protected activity on behalf of the union.

2. Whether the Board properly declined to permit relitigation in the unfair labor practice proceeding of issues determined in the earlier representation proceeding.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition at pp. 3-4. Also relevant is Section 3(b), which provides in pertinent part:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any

interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. * * *

STATEMENT

1. Under contract with the National Aviation and Space Agency ("NASA"), petitioner Company provides visitor services, public information services and exhibit displays at the Manned Spacecraft Center in Houston, Texas (Pet. App. 5d). In January 1971, Mrs. Barbara Salvato, an exhibit scheduler, and Richard Hancock, an escort, met with officials of District No. 37, International Association of Machinists (the Union) at Mrs. Salvato's home to discuss organizing the Company's clerical and escort employees (Pet. App. 20d; A. 114-115).[1] Mrs. Salvato signed an authorization card and took additional cards. She later obtained signatures on them during the lunch periods in the cafeteria (Pet. App. 20d; A. 115-116). On February 19, the Union filed a petition with the Board seeking to represent the escort and clerical employees (Pet. App. 6d). The hearing on the Union's petition was held on March 26, and, by that time, Project Manager Lockridge had learned of Mrs. Salvato's activity on behalf of the Union (Pet. App. 6d, 20d; A. 135).

At the hearing, the Company stated that, as a re-

[1] "A." refers to the appendix to the briefs in the court below.

sult of the staffing specifications on NASA's most recent request for bids, the Company had eliminated the position of secretary to Project Manager Lockridge as of April 1, and that thereafter the exhibit scheduler would spend half her time as Lockridge's secretary and the remainder as exhibit scheduler (Pet. App. 6d, n. 3; A. 145-146). On April 1, the position of secretary to the project manager was abolished, and Patricia Hopkins, who had been Lockridge's secretary for over a year, was transferred to duty as an escort (Pet. App. 8d; A. 113, 147). During the first three weeks of April, however, she spent "a substantial portion of her time" assisting Lockridge (Pet. App. 12d; A. 114, 131-132, 158).

During this three-week period in April, Mrs. Salvato, in addition to her work as exhibit scheduler,[2] spent about 5 percent of her time doing typing for Lockridge (Pet. App. 15d; A. 112). This typing included Lockridge's notes of the negotiations with the Union on March 31, April 2, and April 13, concerning a contract for the exhibit employees;[3] a memorandum to Lockridge from Exhibits Supervisor Kennedy listing the projects which would be affected by a strike of the exhibit employees; and a list of the escort and clerical employees eligible to vote in the election[4] (Pet.

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[2] Exhibit schedulers maintain files, carry on correspondence, and generally handle the clerical functions in connection with exhibits (Pet. App. 7d-8d).

[3] In 1968, the Union had successfully organized the employees who fabricate and erect exhibits (Pet. App. 6d).

[4] On April 13, the Regional Director had ordered that an election be held on the Union's petition (Pet. App. 6d).

App. 13d-14d; A. 112, 179-188). She had no responsibility for Lockridge's files as she was unfamiliar with them (Pet. App. 12d; A. 159).

On April 19, Salvato encountered a fellow employee, Mrs. LeBecca Kite, in the ladies' room (Pet. App. 22d-23d; A. 117, 137). After an exchange of "trivialities," a discussion of the upcoming Union election occurred during which Salvato told Kite that, if she could not vote for the Union, she should not vote (Pet. App. 22d-23d; A. 137-138). Kite later related the incident to Lockridge (Pet. App. 24d; A. 138-140, 162).

The following day, Lockridge summoned Mrs. Salvato to his office, where she met Lockridge, Exhibits Supervisor Kennedy, and Chief of Industrial Relations Mitchell (Pet. App. 25d; A. 118, 150-151). Lockridge placed Salvato on a three-day suspension without pay "for carrying on illegal Union activity on Company premises and Company time" (Pet. App. 25d; A. 161). The following Monday, April 26, she was discharged because she had allegedly "threatened" Mrs. Kite (Pet. App. 26d-27d; A. 120).

At the election, held on May 13, 8 votes were cast for the Union, 6 votes were cast against it, and 4 ballots were challenged, including that of Salvato who was challenged on the ground that she was a confidential employee (Pet. App. 3d). Since the challenges were sufficient to affect the results of the election, the Regional Director ordered that a hearing be held on the issues raised thereby. Meanwhile, a complaint issued on the Union's charge that Salvato had been unlawfully discharged. The two proceedings were consolidated for hearing before a Trial Examiner (Pet. App. 1d-2d).

2. The Trial Examiner found that Salvato was not a confidential employee. He explained that (Pet. App. 16d, citations omitted):

> There are two elements that must be considered in determining whether particular employees should be excluded from a unit as "confidential": first, the executives to whom the employees are attached must be "persons who formulate, determine, and effectuate management policies in the field of labor relations" and second, the employees must "assist and act in a confidential capacity to [those] officials." * * *

The Examiner expressed "doubt" whether Lockridge effectuated labor policy, since he had very limited duties concerning labor relations and primary responsibility therefor rested with the Company's director of labor relations (Pet. App. 17d, n. 12). He found that, in any event, "the small amount of typing performed by Mrs. Salvato for Lockridge, her lack of access to any of his files, the physical separation of her working area from his office, and her complete lack of other contact with matters relating to labor relations, lead to the conclusion that she cannot properly be designated as a person acting in a 'confidential' capacity to Lockridge" (Pet. App. 17d-18d).[5]

---

[5] The Examiner noted that "the company's arrangement for providing Lockridge with secretarial services, as projected in the representation hearing, was not brought into existence: Lockridge's secretary was not transferred to the position of exhibits scheduler and Mrs. Salvato, who was the exhibits scheduler both before and after April 1, neither devoted half her time to acting as Lockridge's secretary nor did she 'have access to all personnel files'" (Pet. App. 17d).

The Examiner further rejected the Company's contention that it lawfully "discharged [Salvato] for a breach of Company rules in threatening Mrs. LeBecca Kite" (Pet. App. 27d). The Examiner stated (Pet. App. 28d):

> Insofar as the company's justification for the discharge is based upon union activity "on company time," it cannot be sustained, any more than a rule prohibiting such activity in those terms could justify discipline or discharge. [Citing *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793.]
>
> Consideration of the language used, according to Mrs. Kite's testimony, in the conversation between her and Mrs. Salvato leads to the conclusion that nothing in it can reasonably be construed as a threat. There is nothing inherently coercive about urging abstention from voting and there is no claim that the words meant anything more than that. [Footnote omitted.]

He concluded (Pet. App. 29d):

> The various reasons assigned by the company for discharging Mrs. Salvato were * * * pretexts to mask its real reasons for her discharge and that the real reasons were retaliation for her organizational activities and the desire to rid itself of a union adherent. * * *

The Board sustained the Examiner's findings that Salvato was not a confidential employee, and that her discharge violated Section 8(a)(3) and (1) of the Act.

It ordered the Company to reinstate Salvato, and it directed the Regional Director to count her ballot and those of 2 others found to be valid (Pet. App. 31d-34d, 37d-38d). The revised tally of ballots showed that the Union won the election 9 to 8, and it was certified by the Regional Director (Pet. App. 4c).

3. The Company refused the Union's request to bargain, and, in the subsequent unfair labor practice proceeding, the Board, finding that all issues raised by the Company had been litigated in the prior representation proceeding, granted the General Counsel's motion for summary judgment (Pet. App. 4c-5c). The Board thus concluded that the Company violated Section 8(a)(5) and (1) of the Act in refusing to bargain with the Union, and it issued a bargaining order (Pet. App. 6c-7c, 10c). The court of appeals summarily enforced the Board's order (Pet. App. 1b).

ARGUMENT

1. Petitioner contends that the certification of the Union was invalid because Salvato was a confidential employee and thus not entitled to vote in the election, which the Union won by one vote (Pet. 9-11). The Board, however, found that Salvato was not a confidential employee. Accordingly, the Company's contention merely raises the evidentiary issue whether substantial evidence supports the Board's finding that Salvato was not a confidential employee, which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488. In any event, the Board's finding is amply supported by the record.

The Board excludes from bargaining units of other employees "only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *B. F. Goodrich Co.*, 115 NLRB 722, 724. Moreover, the Board excludes only those employees who spend a substantial amount of time in such duties. *Moore-McCormack Lines*, 181 NLRB 510, 512. Here, Salvato's work for Lockridge, whose authority to effectuate labor policy was questionable, involved only 5 percent of her total work time. She had no access to the Company's personnel or grievance files, and she worked in an area physically separated from Lockridge.[6] In these circumstances, the Board was warranted in finding that Salvato was not a confidential employee.

2. Similarly, petitioner's contention that Salvato was discharged because she threatened Kite (Pet. 11-16) raises only an evidentiary question. The Trial Examiner rejected Project Manager Lockridge's testimony that Salvato had threatened Kite. He pointed out that Kite had testified that she was not "scared," but rather "angry" (Pet. App. 24d-25d). The Examiner concluded that: "Lockridge's use of the word 'threatened' and the phrase 'possibly she had been threatened physically' * * * represent[ed] his own

[6] As the Examiner pointed out: "The amount of typing [Salvato] performed for him could just as easily have been assigned by Lockridge to any employee on the project with minimal typing capacity—or spread out among several—and, unless consideration is given to the quantity of the services performed, each employee so involved would be thereby excluded from the unit.* * *" (Pet. App. 18d).

contribution to the exchange between the two employees * * * as an effort on his part to exacerbate the tone of the incident to justify his charge of misconduct by Mrs. Salvato" (Pet. App. 25d). The Examiner was thus justified in finding that "nothing in [Salvato's remarks] can reasonably be construed as a threat" (Pet. App. 28d).[7]

3. Finally, petitioner contends (Pet. 16-18) that it was entitled to relitigate in the unfair labor practice proceeding the issue whether Salvato was a confidential employee. It has long been settled, however, that, absent a showing of newly discovered or previously unavailable evidence, matters which were or could have been considered in the representation case may not be relitigated in a subsequent, related unfair labor practice case. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 158, 162. Accord: *Magnesium Casting Co.* v. *National Labor Relations Board*, 401 U.S. 137. Here, petitioner received an evidentiary hearing on its objections in the underlying representation proceeding, and it advanced no new or previously unavailable evidence to support its repetition of those objections in the unfair labor practice proceeding.[8]

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[7] Since the Board's finding that Salvato was not a confidential employee is amply supported by the record (*supra*, pp. 6, 9), there is no occasion to reach the Board's alternative conclusion that, even if Salvato were a confidential employee, she would be protected by the Act against a discriminatory discharge (Pet. App. 29d-30d). See *Wheeling Electric Co.*, 182 NLRB 218, enforcement denied, 444 F. 2d 783 (C.A. 4).

[8] The cases relied on by the petitioner (Pet. 16-17) involve the denial of a hearing in the *representation* proceeding even though substantial and material factual issues were presented. *Pepsi-Cola*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Buffalo Bottling Co. v. ***National Labor Relations Board***, 409 F. 2d 676 (C.A. 2), Pet. 17, which held that the Board must review the decision of the regional director in a representation proceeding, was implicitly modified by this Court's decision in ***Magnesium Casting, supra***, upholding the Board's authority to delegate the deciding of representation issues to regional directors.

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